

Data for performance measure PM 5, Percent Firm Order Confirmation (“FOC”) received, are incorrect and create a misleading impression.⁹⁰ SWBT’s data indicated that BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL FOCs were returned to Rhythms from October through December.⁹¹ This number is inconsistent with Rhythms data showing that BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL loops were provisioned during that time period.⁹² Based on the data SWBT has made available currently, Rhythms is unable to reconcile this inconsistency.⁹³ It is unclear why SWBT would report return of FOCs but then report 0 for DSL loop installation intervals.⁹⁴ These data suggest that SWBT did not successfully provision any of the orders for which FOCs were returned, which is incorrect.

SWBT’s report for PM 55.1, discussed above, also contains incorrect data. SWBT reports a 0 in all fields on this report, which identifies the average installation interval for DSL loops.⁹⁵ These data are inconsistent with Rhythms’ data, which show that BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL loops were provisioned between October and December 1999. Every loop should have had an installation interval reported for it. Therefore, SWBT’s data should be non-zero.

SWBT’s report for PM 56, which reports the percentage of loops installed in a specified number of days, contains incorrect data regarding ISDN BRI loops. SWBT reports 0 for Rhythms’ ISDN BRI loops installations.⁹⁶ However, Rhythms had BEGIN

⁹⁰ Lopez Affidavit at ¶ 4.

⁹¹ Lopez Affidavit at ¶ 4.

⁹² Lopez Affidavit at ¶ 4.

⁹³ Lopez Affidavit at ¶ 4.

⁹⁴ See discussion of PM 51.1 below.

⁹⁵ Lopez Affidavit at ¶ 8.

⁹⁶ Lopez Affidavit at ¶ 9.

CONFIDENTIAL *** ***END CONFIDENTIAL such loops provisioned during the reporting period. SWBT also reports 0 for 8.0 dB UNE loops. If this measure is intended to capture DSL loops, then a 0 report is incorrect.⁹⁷

SWBT's report for PM 57, which reports average response time for loop makeup information, contains incorrect data. SWBT reports that its average response time was between 1 and 2 hours for October through November.⁹⁸ However, Rhythms typically received loop makeup information in 5 to 10 days.⁹⁹

SWBT's report for PM 60, percent missed due dates due to lack of facilities, contains incorrect data. SWBT reports that it missed a due date due to lack of facilities for only BEGIN CONFIDENTIAL *** *** END CONFIDENTIAL loops in October through December.¹⁰⁰ However, Rhythms data indicates that the actual number is BEGIN CONFIDENTIAL *** *** END CONFIDENTIAL loops, almost BEGIN CONFIDENTIAL *** ***END CONFIDENTIAL times as many loops as SWBT reports.¹⁰¹

Data for PM 62, average delay days for SWBT-caused missed due dates, is inconsistent both with SWBT's own data reported in other categories and with Rhythms' internal data. . SWBT reports 0 delays due to SWBT-caused missed due dates.¹⁰² However, in PM 58, SWBT reports that half of Rhythms' BEGIN CONFIDENTIAL *** ***END CONFIDENTIAL ISDN loop orders placed in November had SWBT-caused missed due dates. The data in PM 58 is consistent with Rhythms' internal data, which shows that Rhythms experienced SWBT-caused

⁹⁷ Lopez Affidavit at ¶ 9.

⁹⁸ Lopez Affidavit at ¶ 10.

⁹⁹ Lopez Affidavit at ¶ 10.

¹⁰⁰ Lopez Affidavit at ¶ 11.

¹⁰¹ Lopez Affidavit at ¶ 13.

¹⁰² Lopez Affidavit at ¶ 14.

missed due dates for delays for BEGIN CONFIDENTIAL *** ***END CONFIDENTIAL
IDSL orders due to incompatible cards in SWBT's D*scus equipment. The cards in that unit
were finally replaced, but the loop orders were delayed substantially. Thus, SWBT's report of 0
for average delay days in PM 62 is inconsistent with SWBT's own data reported in other
categories, and with Rhythms' data.

Data for PM 64, which reports the number of orders cancelled after SWBT-caused
missed due dates, are completely inaccurate. SWBT reports that Rhythms had BEGIN
CONFIDENTIAL *** ***END CONFIDENTIAL such orders cancelled in March 1999, but
Rhythms did not have collocation and at that time, and was not able to begin placing loop orders
until October 1999.¹⁰³ At the same time, SWBT's data fail to report that Rhythms did have
orders cancelled in 1999, during the October to December reporting period due to substantial
delays in SWBT provisioning loops.¹⁰⁴ SWBT reports 0 cancellations for all months other than
March 1999 for Rhythms.¹⁰⁵

SWBT's report for PM 65, percentage of trouble reports, contains incorrect data. SWBT
reports that Rhythms submitted only five trouble tickets between October and November,
however, Rhythms data indicates that BEGIN CONFIDENTIAL *** ***END
CONFIDENTIAL trouble reports were submitted during that period.¹⁰⁶

Other CLECs, including Covad¹⁰⁷ and NorthPoint,¹⁰⁸ have identified significant
discrepancies between SWBT's reports of recent performance and their own data as well.¹⁰⁹

¹⁰³ Lopez Affidavit at ¶ 15.

¹⁰⁴ Lopez Affidavit at ¶ 15.

¹⁰⁵ Lopez Affidavit at ¶ 15.

¹⁰⁶ Lopez Affidavit at ¶ 16.

¹⁰⁷ Covad at 27 ("the performance data submitted by SWBT fail to include approximately 58% of Covad's
orders.").

The current situation is aptly summarized by DSL.net:

Performance measures for SWBT's xDSL provisioning were established under the Arbitration Award in December 1999, only weeks before SWBT filed this §271 application. No meaningful data is available to measure SWBT's performance under these standards. The scant data offered with the Application is utterly insufficient to demonstrate that SWBT's [sic] does not discriminate against competitors in the provisioning of DSL-capable loops. Therefore, SWBT has failed to satisfy item four of the §271 checklist, regarding the provision of local loops.¹¹⁰

C. SWBT's Data Indicate Serious Problems With SWBT's Provisioning Performance

Although Rhythms had little performance data to examine, it is clear that SWBT's performance in provisioning loops has serious flaws. Even the incomplete and unreconciled data SWBT did provide show a precipitous trend of declining performance in provisioning loops.¹¹¹ After evaluating these data, the DOJ concluded that SWBT "has experienced a disturbing number of problems in processing orders as the volume of orders has increased; there is "a significant risk that these problems may become even more acute as UNE-loop orders continue to rise."¹¹² These performance problems lead the Department of Justice to conclude that SWBT has failed to demonstrate it is providing non-discriminatory access to xDSL loops,¹¹³ and to recommend denial of SWBT's 271 application. Rhythms' specific data, which were unavailable

¹⁰⁸ See NorthPoint at 2, 9-10 (SWBT's loop installation interval data was based on zero NorthPoint loop orders, although NorthPoint has submitted more than 1000 DSL loop orders in Texas since they were made available in September 1999).

¹⁰⁹ Although the focus of Rhythms' comments is on xDSL-capable loops, the deficiencies in SWBT's performance data are not limited to xDSL-capable loops. See, e.g., MCI WorldCom at 33 (performance data cannot show readiness of SWBT's systems because: order volume is too low, data has not been sufficiently audited, and data does not capture key functional deficiencies. See also AT&T at 76-79.

¹¹⁰ DSL.net at 8-9.

¹¹¹ See e.g., Lopez Affidavit at ¶ 6 (FOC).

¹¹² DOJ Evaluation at 36.

¹¹³ DOJ Evaluation at 10.

to the DOJ prior the deadline for filing its comments, show the same disturbing trend identified by DOJ for other CLECs.

**1. SWBT's Performance for Return of FOC
Is Growing Increasingly Worse**

SWBT's data shows a dramatic decrease in performance for return of FOC to CLECs. In September SWBT states that it returned 100 percent of FOCs to Rhythms within 24 hours.¹¹⁴ However, during November, the percentage dropped by 20% to 80 percent FOCs returned within 24 hours.¹¹⁵ Data for the next two months show a continuing decline: only 72.2% of FOCs were returned within 24 hours in November and only 63% of FOCs were returned within 24 hours in December.¹¹⁶ This substantial drop in performance is especially disturbing because the total number of loop orders reported by SWBT during this four month period was BEGIN CONFIDENTIAL*** *** END CONFIDENTIAL.¹¹⁷ If SWBT is experiencing such serious performance problems with this small number of loop orders, it is clear that SWBT's OSS can't support CLECs' needs.¹¹⁸ Other ILECs are not experiencing the same poor performance. Pacific Bell, SWBT's sister company, returns a FOC within 24 hours virtually 100 percent of the time on commercial volumes of loop orders.¹¹⁹

Rhythms experience is consistent with that of other CLECs. Covad, for example, reports that the percentage of FOCs returned within a single business day declined from 58% in September 1999 to 11.47% in December, and that by December more than 40% of Covad's

¹¹⁴ Lopez Affidavit at ¶ 6.

¹¹⁵ Lopez Affidavit at ¶ 6.

¹¹⁶ Lopez Affidavit at ¶ 6.

¹¹⁷ Lopez Affidavit at ¶ 6.

¹¹⁸ Lopez Affidavit at ¶ 6.

¹¹⁹ Lopez Affidavit at ¶ 6.

orders were still waiting for a FOC for more than five business days.¹²⁰ Worse, SWBT's OSS frequently rejects CLEC loop orders days after a FOC is issued. Such uncertainty makes it impossible for CLECs to make guarantees to their customers regarding delivery of service.

The DOJ found that SWBT's performance for return of FOC is seriously flawed regardless of the method of delivery. SWBT's performance for FOCs returned via EDI has fallen below the Texas benchmark for the last three months studied by the Texas PUC.¹²¹ SWBT's performance for FOCs returned manually has shown a similar decline.¹²² SWBT's performance for FOCs returned via LEX are chronically late and SWBT cannot explain why the problem is occurring.¹²³

2. Delivery of Loops

Covad has reported that "SWBT routinely fails to provide xDSL-capable loops on time and that its performance has gotten worse as Covad's orders have increased."¹²⁴ Similarly, NorthPoint stated that "because of the difficulties SWBT faces in meeting even the small current demand for DSL loops using its manual processes, less than 50% of NorthPoint's loop orders are provisioned on time and with unnecessary and frequent problems."¹²⁵ Such difficulties might be eased by acceptance testing for CLEC loops. However, despite SWBT's assurances to the Texas PUC that it would offer such testing, none has been available to date.

¹²⁰ Covad at 35.

¹²¹ DOJ Evaluation at 38.

¹²² DOJ Evaluation at 39.

¹²³ DOJ Evaluation at 38-39.

¹²⁴ Covad at 21. Covad also reports that the rate of failed Covad dispatches due to faulty or non-functioning loops provided by SWBT nearly doubled from October 1999 to December 1999, from 16.4% to 30.2%. Covad at 38.

¹²⁵ NorthPoint at 14.

3. Performance For Retail Operations Far Exceeds CLEC Support

Data for PM 59, which reports the percentage of trouble reports for DSL loops within 30 days, show a huge disparity between the occurrence of trouble reports for Rhythms as compared to SWBT's retail operations. According to SWBT's own data, Rhythms had 61.6 percent more trouble reports than SWBT's retail DSL operations. Such large disparity indicates that SWBT does not handle CLEC orders for DSL loops in a non-discriminatory manner.

PM 65, which reports overall trouble report rates, SWBT's data indicates that for December of 1999, Rhythms has a much higher percentage of trouble reports than SWBT. According to SWBT's data for December 1999, Rhythms had a 50 percent occurrence of trouble reports per loop, compared to 5.18 percent for SWBT. Thus Rhythms had ten times as many trouble reports on its loops than did SWBT's internal operations.

4. SWBT's Data Show It Cannot Handle Commercial Volumes of Orders

PM 58 reports the percentage of SWBT-caused missed due dates ISDN BRI loops. SWBT's data shows that half of Rhythms' ISDN loop orders placed in November had missed due dates caused by SWBT. This poor performance is especially alarming given that Rhythms ordered BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL BRI loop orders in November. If SWBT's processes result in a 50 percent failure rate at low volumes, Rhythms expects SWBT's performance will get worse at higher volumes.

D. SWBT's Poor Performance Stems From Serious Flaws In Its Provisioning Process

1. SWBT's Manual OSS is Error-Prone

SWBT's failure to provision xDSL capable loops on a nondiscriminatory basis is largely attributable to its continued reliance on manual processing. The DOJ found that more than 50

percent of UNE-loop orders electronically submitted via EDI or LEX are manually processed.¹²⁶

As the CLEC Coalition has observed: “When SWBT’s OSS causes needless manual fallout of orders, manual workarounds and missed due dates, the customer’s business suffers and the CLEC takes the blame. Unfortunately, whenever things go bad for the CLECs, it is a win-win situation for SWBT.”¹²⁷ The DOJ agreed that a high degree of manual processing may cause “serious problems with the timeliness and accuracy” of order processing and provisioning.¹²⁸ SWBT’s reliance on manual processing of DSL loop orders is inadequate and does not meet SWBT’s obligations under checklist item 2 to provide non-discriminatory access to OSS.

2. SWBT’s OSS Favors The Single Type of DSL SWBT Is Offering

SWBT has tailored its mechanized loop pre-qualification system to efficiently support its retail ADSL offering.¹²⁹ That system utilizes a special mini database that returns a so-called red/yellow/green indicator alerting SWBT’s internal personnel whether a loop is appropriate for SBC’s implementation of ADSL.¹³⁰ As the Texas PUC specifically concluded, this red/yellow/green indicator is of no use to CLECs, which offer multiple types of xDSL and cannot meet the OSS requirements of Section 271.¹³¹ CLECs requiring loop makeup information beyond the red/yellow/green indicator to support their offerings of other “flavors” of xDSL must resort to a manual loop qualification system that suffers from numerous deficiencies. SWBT’s loop qualification databases are inaccurate.¹³² SWBT frequently misses its 3-5 day loop

¹²⁶ DOJ Evaluation at 38.

¹²⁷ CLEC Coalition at 20 (footnote omitted).

¹²⁸ DOJ Evaluation at 38.

¹²⁹ Rhythms/Covad Arbitration Award, Docket 20226/20272, November 30, 1999 at 62 [Rhythms Covad Arbitration Award].

¹³⁰ Rhythms/Covad Arbitration Award at 59-60; Chapman Affidavit ¶¶ 12-15.

¹³¹ Rhythms/Covad Arbitration Award at 60-62.

¹³² NorthPoint at 15-16.

qualification interval or fails to provide required loop qualification information.¹³³ Because SWBT's pre-qualification system is tailored to support SWBT's own retail DSL operations, the system is inadequate for CLECs and does not meet SWBT's obligations under checklist item 2 to provide non-discriminatory access to OSS.

3. SWBT's OSS Rejects Loop Orders for Arbitrary and Improper Reasons

SWBT's OSS automatically rejects orders requesting provisioning intervals shorter than the absolute maximum allowed, recently shortened from twelve business days to ten business days for Rhythms.¹³⁴ Orders for xDSL-capable loops submitted by CLECs are often erroneously rejected because of defects in SWBT's manual order processing system.¹³⁵ CLECs often receive rejections that are incomprehensible. As one commenter observed:

It appears that SWBT representatives who reject orders may select from a pull-down menu of 'causes' for rejection and simply select the menu option that approximates the true reject reason. When the CLEC representative calls the LSC, there is no way to identify which LSC representative rejected the order and the LSC representative who takes the call may say the order looks fine and that it should be resubmitted.¹³⁶

SWBT also rejects loop orders for improper reasons such as loop length or spectrum management.¹³⁷

E. Performance Measurements From Texas Are Inadequate To Ensure Competition

Through a collaborative workshop process, the Texas PUC put forth a series of performance measures for SWBT's provisioning of DSL loops.¹³⁸ As Rhythms noted its initial

¹³³ NorthPoint at 16.

¹³⁴ Rhythms at 53-54.

¹³⁵ NorthPoint at 14-15.

¹³⁶ CLEC Coalition at 19.

¹³⁷ Rhythms at 37-8; Telcordia Report at 4.4.1.5.3.

comments, very few of the performance measures pertain specifically to DSL issues.¹³⁹ Further, the PMs do not capture the correct performance data. For example, PM 5, is supposed to provide CLECs with data regarding intervals for return of a FOC. However, SWBT has interpreted the PM and collected data in such a way that the PM is extremely misleading.

SWBT's practice has been to report only the amount of time spent by a SWBT employee processing a FOC after the receipt of a "complete and accurate" order.¹⁴⁰ This approach fails to capture the total time spent on an order.¹⁴¹ For example, one of Rhythms' orders in October had to be supplemented multiple times over the period of one week due to various "errors" with the orders.¹⁴² Rhythms' difficulties in ordering were caused by SWBT's failure to offer any specific training for ordering DSL loops until after this order was initiated.¹⁴³ Because SWBT had not provided any instructions on the precise codes and information required in various ordering fields for DSL loops, Rhythms was forced to guess, and determine the correct entries through trial and error.¹⁴⁴ After the last of Rhythms' repeat submissions, a FOC was returned within 24 hours.¹⁴⁵ Despite the fact that it actually took one week to return a FOC, SWBT's data create the misleading impression that the total time for return of FOC was less than 24 hours.¹⁴⁶ This

¹³⁸ Texas PUC at 3.

¹³⁹ Rhythms at 48.

¹⁴⁰ Lopez Affidavit at ¶ 5.

¹⁴¹ Lopez Affidavit at ¶ 5.

¹⁴² Lopez Affidavit at ¶ 5.

¹⁴³ Lopez Affidavit at ¶ 5.

¹⁴⁴ Lopez Affidavit at ¶ 5.

¹⁴⁵ Lopez Affidavit at ¶ 5.

¹⁴⁶ Lopez Affidavit at ¶ 5.

under reporting of time to return a FOC is a good example of the weaknesses in the Texas performance measures, and underscore the need for a DSL-specific set of measures.¹⁴⁷

Another example of the inadequacies of the Texas performance measures is found in PM 58, which uses the installation intervals for DS1 circuits as the retail analog benchmark for comparison of the installation intervals of DSL loops. This presents at least three separate issues. First, DS1 circuits are designed circuits, requiring additional engineering prior to provisioning.¹⁴⁸ Second, the choice of DS1 as a benchmark highlights the fact that the performance measures currently in existence are merely haphazard revisions to measures developed for POTS and other conventional LEC services, rather than specific measures focused on the provisioning of DSL services.¹⁴⁹ Finally, using DS1 as the benchmark serves as an ominous reminder of SWBT's outlawed "Binder Group Management/Selective Feeder Separation" policy, which assigned analog DS1's (known disturbers) to separate binder groups to avoid interference with other services.¹⁵⁰

SWBT has suggested that a longer provisioning interval is appropriate for CLECs than for its own retail DSL service, citing the fact that some CLECs deploy DSL services on longer loops than SWBT.¹⁵¹ Although it may be true that longer loops could require removal of additional devices not present on shorter loops,¹⁵² there should be only a small incremental difference in the total time required to condition DSL loops deployed by SWBT and its

¹⁴⁷ Lopez Affidavit at ¶ 5.

¹⁴⁸ Lopez Affidavit at ¶18.

¹⁴⁹ Lopez Affidavit at ¶18.

¹⁵⁰ Lopez Affidavit at ¶19.

¹⁵¹ Lopez Affidavit at ¶20.

¹⁵² Lopez Affidavit at ¶20.

competitors.¹⁵³ Loops shorter than approximately 18,000 feet in length which have load coils installed do not meet industry standards, which have been in place for more than 15 years.¹⁵⁴ If any such loops are loaded, SWBT and its competitors should have equal likelihood of using such a loop to provide DSL services, so there should be no difference in provisioning intervals.¹⁵⁵ Even where Rhythms deploys DSL services on loops between 18,000 and 22,000 feet, those loops will often fall within the industry standard 1300 ohms (on which the “18,000 foot limit” is based) because heavier gauge cable has been deployed in the loop plant.¹⁵⁶ Even if a loop in the 18,000 to 22,000 foot range is loaded, the only incremental work to be done in comparison with a loaded loop of less than 18,000 feet will be that needed to remove one additional load coil (*i.e.*, four load coils instead of three), a minimal difference in overall provisioning time.¹⁵⁷ On balance, it is appropriate to use the same provisioning intervals for both CLECs and SWBT’s retail offering when establishing performance measures.¹⁵⁸ However, if the Commission wishes to establish different conditioning intervals, separate performance measures should be required for loops longer than 17,500 feet.¹⁵⁹

Until PMs are in place that yield accurate data on SWBT’s performance, it is premature for the Commission to determine that SWBT is offering CLECs non-discriminatory access to OSS or unbundled loops for DSL service.

¹⁵³ Lopez Affidavit at ¶20.

¹⁵⁴ Lopez Affidavit at ¶21.

¹⁵⁵ Lopez Affidavit at ¶21.

¹⁵⁶ Lopez Affidavit at ¶22.

¹⁵⁷ Lopez Affidavit at ¶22.

¹⁵⁸ Lopez Affidavit at ¶23.

¹⁵⁹ Lopez Affidavit at ¶23.

IV. SWBT’S PAPER PROMISES OF FUTURE PERFORMANCE ARE NOT AN ACCEPTABLE SUBSTITUTE FOR COMPLIANCE WITH ITEMS TWO AND FOUR OF THE COMPETITIVE CHECKLIST

The Texas PUC acknowledged the paucity of xDSL loops provisioned prior to SBC’s Section 271 application and expressly noted that it “was concerned about the data results,” of SBC’s provisioning of unbundled loops for xDSL services.¹⁶⁰ Despite these reservations, however, the Texas PUC determined that SWBT’s loop provisioning process would be adequate due to “current legal obligations, performance, and commitments made during the 271 proceeding, as well as SWBT’s obligations under both the *SBC/Ameritech* merger conditions and the xDSL arbitrations in Texas Commission Docket Nos. 20226 and 20272.”¹⁶¹ These paper commitments, to be performed at some unspecified time in the future are not adequate substitute for actual successful provisioning of unbundled loops on a non-discriminatory basis under Section 271 of the Act.¹⁶² The Commission should not find that SBC has met the requirements of checklist item four for non-discriminatory access to unbundled loops until SBC can demonstrate consistent, actual performance.

A. Obligations Under The SBC/Ameritech Merger Conditions

The Texas PUC cites SBC’s creation of a separate advanced services affiliate, ASI, as one of several factors on which it bases its finding that SWBT has met its obligation to provide nondiscriminatory access to xDSL-capable loops.¹⁶³ But, as Rhythms and other commenters have already demonstrated, SWBT has only begun the process of transitioning its advanced

¹⁶⁰ Texas PUC at 64.

¹⁶¹ Texas PUC at 60.

¹⁶² *BA-NY 271 Order* ¶ 37 (promises of future performance have no probative value and should be given no weight).

¹⁶³ Texas PUC at 60.

services assets and operations to ASI.¹⁶⁴ As the DOJ and other Commenters note, ASI is neither separate nor fully operational at this time.¹⁶⁵ ASI will not begin passing Local Service Requests (“LSRs”) for UNEs, the ordering method CLECs must use, until February 28, 2000.¹⁶⁶ SBC has acknowledged publicly that its internal ADSL operations do not currently use the same OSS for pre-ordering, ordering or provisioning unbundled loops as CLECs.¹⁶⁷

In addition, ASI is in a unique, preferential position as compared to CLECs because it may immediately engage in line sharing with SWBT, on terms and conditions that are neither reflected in its interconnection agreement nor available to any other Texas CLEC.¹⁶⁸ SWBT already has in place an integrated service negotiation system that allows a mechanized flow of retail orders into SWBT’s ordering system,¹⁶⁹ to which ASI presumably has access, but it has made no commitment to CLECs to provide mechanized OSS for CLEC line sharing orders.¹⁷⁰

B. Rhythms/Covad Arbitration Award

The Texas PUC issued a final order approving contract language implementing the Rhythms/Covad arbitration award on February 7, 2000, well after SWBT filed its 271 application. SWBT has not yet taken steps to implement the requirements of that contract. For example, SWBT has not yet dismantled its BGM/SFS system, nor has it made access to its back-end OSS

¹⁶⁴ Rhythms at 60; DOJ Evaluation at 26.

¹⁶⁵ DOJ Evaluation at 2, 26-27.

¹⁶⁶ Rhythms at 47 (citing SWBT 271 Application at 44).

¹⁶⁷ CLEC POR Notification (February 1 Transcript at 80-81) [Attachment A].

¹⁶⁸ Rhythms at 43-44; Covad at 52-56.

¹⁶⁹ Rhythms at 25.

¹⁷⁰ At the February POR meeting, SBC personnel directed CLECs to address pre-ordering and ordering issues regarding line sharing in SBC’s Line Sharing implementation process. However, SBC personnel directing the Line Sharing implementation process indicated that the trial would include only manual order processing and was *not* going to address mechanized ordering through Datagate and EDI. CLEC POR Notification at 17-18 [Provided as Attachment A].

and databases such as LFACs, LEAD and TIRKS.¹⁷¹ Further, the contract language remains subject to appeal or reconsideration. It is likely that SWBT will challenge the interconnection agreement because it tried twice to have the Arbitration Award overturned prior to the Commission even voting on the matter. Only after the Arbitration Award is implemented in an Interconnection Agreement will it be possible to begin to collect evidence to establish whether SWBT has begun to open the xDSL market in Texas to competition. At this time, it is far too early to assess the adequacy of SBC's xDSL provisioning.

C. SWBT's Commitments During the 271 Proceeding

The Texas PUC has inappropriately relied on the last minute promises made by SWBT in the course of the Texas 271 proceedings.¹⁷² SWBT has effectively given the Texas PUC the proverbial sleeves off its vest, affirming that it will follow the outcome of the Rhythms/Covad xDSL arbitrations, while reserving its right to appeal those decisions.¹⁷³ Similarly, none of the commitments made by SWBT in Attachment 25 to the T2A are final because CLECs must now negotiate a DSL appendix to the T2A based on the outcome of the Arbitration Award.¹⁷⁴

D. Future Process Changes

The Texas PUC relies principally on so-called process changes SWBT agreed to implement in lieu of actual test data to support a determination that SWBT's OSS is adequate to

¹⁷¹ CLEC POR Notification (February 2 Transcript at 570-572) [Attachment A].

¹⁷² Texas PUC at 63. The Texas PUC approved SWBT's Section 271 application that very day (December 16, 1999).

¹⁷³ T2A, Appendix 25: xDSL-TX, ¶ 10.1 ("The Parties acknowledge and agree that the terms and conditions set forth in this Attachment shall be subject to the outcome of the xDSL Arbitration, subject to any associated judicial appeal"); Texas PUC at 61.

¹⁷⁴ T2A, Appendix 25: xDSL-TX, ¶ 10.1 ("Following the issuance of a final Order by the Commission in the xDSL Arbitration, the Parties shall meet within thirty days and expend diligent efforts to arrive at an agreement on conforming modifications to this [T2A] Attachment, based on the final outcome of the xDSL Arbitration and the Memorandum of Understanding filed by SWBT on April 26, 1999, in Project No. 16251. . .").

for xDSL loop orders.¹⁷⁵ “Although the Texas Commission was concerned about the [performance measure] data results, the Texas Commission believes the process changes that have been implemented give CLECs parity performance.”¹⁷⁶ However, a number of the process changes to which SWBT “agreed” actually exist as legal obligations of SWBT’s under earlier orders of the Commission or the Texas PUC. The remaining process changes are either inadequate to address CLECs’ needs, have not been implemented or are unenforceable. As discussed in detail below, there is no evidence that SWBT has or will follow through on its verbal assurances to the Texas PUC regarding process changes. Further, there is no currently existing monitoring or enforcement procedure in place to ensure that SWBT lives up to its promises.

**1. SBC’s Binder Group Management/
Selective Feeder Separation System**

One of the process changes that is most critical to the ability of CLECs to compete in the xDSL market is SBC’s assurance that it will dismantle its binder group management/selective feeder separation (“BGM/SFS”).¹⁷⁷ Although SWBT asserts that it “agreed” to dismantle the BGM/SFS system as part of the Texas PUC’s process changes in December, SWBT was actually ordered to do so earlier in the Rhythms/Covad Arbitration Award in Texas¹⁷⁸ and the Commission’s Line Sharing Order. However, SBC recently acknowledged that it has not yet dismantled its BGM/SFS system and SBC personnel could not provide any details regarding steps being taken to do so.¹⁷⁹ Additionally, SBC stated it did not intend to certify to regulators

¹⁷⁵ Texas PUC at 63-64.

¹⁷⁶ Texas PUC at 64.

¹⁷⁷ Texas PUC at 64.

¹⁷⁸ Arbitration Award at 47-48.

¹⁷⁹ February 2 Transcript, p. 570-572.

that the spectrum management system has been dismantled upon completion.¹⁸⁰ It is critical to the ability of CLECs to compete that SBC dismantle its BGM/SFS system. That system was judged to have no technical merit and to impose seriously anticompetitive effects on the marketplace in both the Texas Arbitration Award and Commission decisions.

2. Elimination of Loop Qualification for Loops 12,000 Feet and Less

SWBT committed to the Texas PUC in December that it would provision loops of 12,000 feet or less without requiring that the loop go through SWBT's mandatory loop qualification process.¹⁸¹ However, at the POR meeting in February described above, SBC personnel indicated that loop qualification was mandatory for all loops, even those of 12,000 feet and less.¹⁸² Only after two days of negotiations did SBC indicate it would change its position and eliminate loop qualification for such loops, but SBC did not commit to eliminate the loop qualification process until July 22, 2000, a date well after the Commission must act on SBC's Section 271 application.¹⁸³ Once again the Commission is being asked to rely on promises of future performance rather than demand compliance. Such reliance is fool hardy in light of SWBT's demonstrated efforts to impeded competition.

3. Streamlining Pre-ordering and Ordering

SWBT agreed to streamline pre-ordering and ordering to eliminate unnecessary rejections and delays.¹⁸⁴ Although this language is vague, the Texas PUC indicates that this commitment means CLECs may order loops "as is" rather than according to one of SWBT's

¹⁸⁰ February 2 Transcript, p. 572.

¹⁸¹ Texas PUC at 64.

¹⁸² CLEC POR Notification [Attachment A] (February 1 Transcript at 277-279) (Q: "But the loop qualification will be mandatory even for loops under 12K? A: [Chapman] That is what we are anticipating.")

¹⁸³ POR Addendum ¶ 3 [Attachment B].

¹⁸⁴ Texas PUC at 64.

seven xDSL categories.¹⁸⁵ Thus, SWBT committed to no more than its existing legal obligations. However, SWBT was already precluded from requiring Rhythms or Covad to order xDSL loops according to SWBT's seven different categories in the Arbitration Award.¹⁸⁶ The PUC additionally indicates that this agreement means SWBT will not reject loops due to length or PSD compliance.¹⁸⁷ However, as Rhythms demonstrates in the Lopez Affidavit, SWBT continues to reject loop orders for improper reasons such as loop length.¹⁸⁸

4. Loop qualification submission via email

SWBT agreed to allow CLECS to submit loop qualification requests via email in addition to facsimile.¹⁸⁹ The impact of this change is nominal and does not constitute the type of electronic order processing required to meet the FCC OSS requirements.¹⁹⁰ This change is inadequate to significantly speed the pre-ordering process because SWBT still has in place a manual loop qualification system. The substitution of email for facsimile requests will have a miniscule effect on the total processing time required under the manual system.

5. Elimination Of PSD Disclosure During Loop Qualification

SWBT "agreed" to allow CLECs to submit loop qualification requests without specifying a PSD mask, but will require such disclosure for loop orders.¹⁹¹ Again, SWBT had already been ordered to make this change in the Arbitration Award.¹⁹²

¹⁸⁵ Texas PUC at 63, n.326,

¹⁸⁶ Arbitration Award, at 10, 13-14.

¹⁸⁷ Texas PUC at 63, n.326.

¹⁸⁸ Rhythms at Attachment 1 (Lopez/Baros Affidavit) at ¶¶ 16-17.

¹⁸⁹ Texas PUC at 64.

¹⁹⁰ Texas PUC at 64.

¹⁹¹ Texas PUC at 65.

¹⁹² Arbitration Award at 63.

6. No conditioning requested

SWBT agreed that when a CLEC does not request conditioning, the loops will be provisioned in the “no conditioning time frame.”¹⁹³ Such “agreement” merely means that SWBT will treat the loop order in the manner the CLEC specifies. SWBT should always be expected to follow directions of CLECs for their loop orders. However, SWBT suggests that this agreement is an important concession, because it will not provision the loop in the longer conditioned loop timeframe even if *SWBT* thinks conditioning is necessary. Such choice is not for SWBT, but for the CLEC to make under any rational customer/provider relationship.

7. Acceptance Testing

SWBT agreed on December 16, 1999 during an open meeting to offer acceptance testing on a per loop basis to CLECs.¹⁹⁴ However, SWBT did not follow through in a timely manner and the terms and conditions under which SWBT offers acceptance testing completely defeat the benefit of such testing for CLECs.¹⁹⁵ Loop acceptance testing provides a CLEC an opportunity to test and verify that a loop is actually working *prior* to loop turnover by SWBT.¹⁹⁶

Rhythms has been asking SWBT to provide acceptance testing since September, 1999 when it first was able under the Interim Agreement to began placing loop orders in Texas.¹⁹⁷ Despite these repeated requests from Rhythms for acceptance testing,¹⁹⁸ SWBT refused to provide it until early February 2000. A SWBT employee informed Rhythms last fall that it

¹⁹³ Texas PUC at 65.

¹⁹⁴ Texas PUC at 65.

¹⁹⁵ Lopez Affidavit ¶ 26.

¹⁹⁶ Such testing should not be confused with coordinated testing, which is jointly performed at the time of loop turnover by the CLEC and SWBT. Such testing is far less useful than acceptance testing, because it is performed at a point so late in the provisioning process that nothing can be done to resolve problems except submit a trouble ticket, which can be a slow and cumbersome process. Lopez Affidavit at ¶ 26.

¹⁹⁷ Lopez Affidavit at ¶ 25.

¹⁹⁸ See Lopez Affidavit at ¶ 25.

would not provide acceptance testing because such functionality is not expressly required in Rhythms' Interim Agreement.¹⁹⁹ Acceptance testing is available in SWBT's T2A, the generally available interconnection agreement for CLECs.²⁰⁰ SWBT's advanced services affiliate has adopted the T2A, so it apparently will receive acceptance testing for its loops.

Although SWBT has finally agreed to provide acceptance testing, the terms under which SWBT provides acceptance testing significantly diminish its usefulness.²⁰¹ SWBT will not perform loop acceptance testing until the day of loop turnover.²⁰² This approach is in sharp contrast to that of Pacific Bell, SWBT's sister company in California.²⁰³ Pacific Bell provides acceptance testing to CLECs three days prior to loop turnover.²⁰⁴ This lead-time is critically important, because if there is a problem with the loop, the CLEC can reject it, and Pacific Bell then has several days to resolve the problem.²⁰⁵ Just as important, the CLEC has an opportunity to notify its customer in advance that there may be a delay in providing DSL service.²⁰⁶

8. Training

SWBT agreed to provide training on the process changes.²⁰⁷ However, as is clear above, SWBT would already be obligated to provide such training because most of the process changes were ordered elsewhere earlier.

¹⁹⁹ Lopez Affidavit at ¶ 25.

²⁰⁰ Lopez Affidavit at ¶ 25.

²⁰¹ Lopez Affidavit at ¶ 26.

²⁰² Lopez Affidavit at ¶ 26.

²⁰³ Lopez Affidavit at ¶ 26.

²⁰⁴ Lopez Affidavit at ¶ 26.

²⁰⁵ Lopez Affidavit at ¶ 26.

²⁰⁶ Lopez Affidavit at ¶ 26.

²⁰⁷ Texas PUC at 65.

9. Loop Makeup Interval

SWBT “agreed” to measure the loop makeup interval from the time the LSC receives the request from a CLEC to the time the LSC returns the information via fax or email. However, SWBT was ordered to measure the return of loop makeup data in this manner in the Commission’s Merger Conditions Order. As the DOJ makes clear, this “agreement” is not a concession but rather it is merely a clear, commonsense way to measure the return of such data.²⁰⁸ SWBT had been underreporting the timeframe for return of loop makeup data by measuring only the time that an employee worked on the request and excluding the period of time SWBT had the request prior to any work being done and excluding the period of time the response remained with SWBT after an employee’s work was completed.²⁰⁹

10. Parity Measurements

SWBT “agreed” to measure the loop makeup process under a parity standard. SWBT also agreed to compare SWBT’s retail loops with no conditioning to CLEC loops with no conditioning for parity purposes, and CLEC loops with conditioning will be compared to SWBT’s retail loops with conditioning. Such parity measurements were already required to demonstrate non-discrimination required by Section 271 of the Act.

V. DOJ CONFIRMS THAT SWBT DOES NOT HAVE IN PLACE A FULLY-OPERATIONAL ADVANCED SERVICES SEPARATE AFFILIATE

DOJ confirms other commenters’ conclusions that SWBT has failed to demonstrate that it has in place a fully-operational separate affiliate for provision of advanced services.²¹⁰ Instead, it is clear that SWBT’s ASI affiliate is not yet “in place,” is nowhere near “fully operational” and

²⁰⁸ DOJ Evaluation at 12.

²⁰⁹ DOJ Evaluation at 10-11.

²¹⁰ DOJ Evaluation at 2, 26-27; Rhythms at 47-8, 60; AT&T at 26; Bluestar at 7; Covad at 52, 56; DSL.net at 7; Sprint at 43.

even when operational will not be either totally “separate” or stand in the same relationship to SWBT as other data CLECs. Accordingly, as DOJ concludes, “SBC fails to show that its proposal to offer DSL services through a separate affiliate will be adequate to prevent a continuation of . . . discrimination” against CLECs.²¹¹

As DOJ observed, since the Commission’s approval of BA-NY’s 271 application, SWBT’s application “provides the first opportunity for the Commission to determine the specific requirements that will be needed to prevent discrimination against DSL competitors” when a BOC exercises the separate affiliate option.²¹² Thus, DOJ concludes that it is “critically important” that the Commission rigorously examine two separate issues.²¹³ The first is whether the BOC’s relationship with its advanced services affiliate “is the same in all relevant respects” as the BOC’s relationship with CLECs.²¹⁴ The second is whether “adequate mechanisms exist to detect, punish and deter any discrimination that may occur.”²¹⁵ DOJ further recommends that the Commission require that an applicant that has failed to provide nondiscriminatory treatment prior to the establishment of a separate affiliate “demonstrate that the implementation of the separate affiliate structure has in fact resulted in nondiscriminatory performance.”²¹⁶

DOJ examination of the record with respect to these issues reveals that SWBT “has provided virtually no information about these matters, and thus *on its face* cannot be deemed to provide satisfactory evidence of nondiscrimination.”²¹⁷ The available evidence demonstrates,

²¹¹ DOJ Evaluation at 12.

²¹² DOJ Evaluation at 25.

²¹³ DOJ Evaluation at 26.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* (emphasis added).

instead, that SWBT's existing and planned relationship with its advanced services affiliate is the exact opposite of the nondiscriminatory relationship necessary to invoke the Commission's separate affiliate option.

Rhythms and other commenters have demonstrated that SBC has, *at best*, provided assurances that it is *in the process of transitioning* its advanced services assets and operations to Advanced Solutions Inc. ("ASI").²¹⁸ As of the date of its application, and yet today, ASI is not separate from SWBT.²¹⁹ Instead ASI relies on SWBT for virtually all of its functions, does not engage in transactions at arm's length and fails to even acknowledge the existence of the broad nondiscrimination obligations to which BOC affiliates are subject under Section 272.²²⁰ SWBT provides ASI with preferential access to loop make-up information and loop ordering and provisioning systems.²²¹ ASI has not yet begun to use the same interfaces, processes and procedures as its CLEC competitors.²²²

Although SWBT's Texas 271 Agreement ("T2A") does not provide for line sharing, ASI is already engaged in line-sharing with SWBT under a separate agreement not available to ASI's competitors.²²³ SWBT has not disclosed the terms of its discriminatory line-sharing agreement with ASI.²²⁴

SWBT has not demonstrated that ASI is either "fully operational" or "separate."²²⁵

²¹⁸ See, e.g., Rhythms at 47-48; Bluestar at 7; Covad at 55; Sprint at 43.

²¹⁹ DOJ at 2, 26-27; see also Rhythms at 47-48; AT&T at 26; Covad at 52-56.

²²⁰ AT&T at 26; Covad at 56-58.

²²¹ AT&T at 24; Covad at 55; DSL.net at 5.

²²² Rhythms at 47; AT&T at 24.

²²³ Rhythms at 47; DSL.net at 7.

²²⁴ ALTS at 43.

²²⁵ See, e.g., AT&T at 23; Covad at 52, 56.

In fact, SWBT has proved little more with respect to ASI than that it has successfully completed “the filing of papers with various governmental agencies.”²²⁶ As DOJ has observed, a “concrete demonstration of nondiscrimination, rather than a [sic] abstract promise, will provide much greater assurance that the separate affiliate structure is in fact sufficient to prevent discrimination.”²²⁷ Because SWBT has failed to produce such a concrete demonstration of nondiscrimination, the Commission cannot conclude that SWBT has met the applicant’s burden of demonstrating that it will not discriminate against its DSL competitors.

Moreover, under this Commission’s merger conditions, such discriminatory treatment will persist well into the future. For instance, in Texas, ASI will continue to have preferential access to space on SWBT premises, including the crucial remote terminals.²²⁸ Under the merger conditions, SWBT is likewise not required to make its OSS systems for advanced services mechanized until October 2001 at the earliest.²²⁹ Finally, and critically, ASI will have access to line sharing, denied to competitors and as this Commission has determined crucial to competition in residential markets, until such time as line sharing is provided to unaffiliated providers of advanced services within the same geographic area.²³⁰ The end result of this analysis is that even if ASI were fully-operational in a manner the meet the merger conditions, which it clearly is not, SWBT could not meet the nondiscrimination requirements of section 271. This is precisely why the Commission concluded that the merger conditions did not “reflect or constitute any

²²⁶ DSL.net at 7.

²²⁷ DOJ Evaluation at 26.

²²⁸ *Merger Order* ¶ 65.

²²⁹ *Merger Order*, Appendix C, Section III. The deployment is to occur, subject to certain assumptions, within 24 months of the Merger closing Date in all States except Connecticut; in Connecticut, deployment is to occur within 30 months.

²³⁰ *Merger Order*, Appendix C, paragraph 4n.

determination or standard regarding SBC/Ameritech's compliance or non-compliance with 47 U.S.C. §§ 251, 252, 271 or 272."²³¹

CONCLUSION

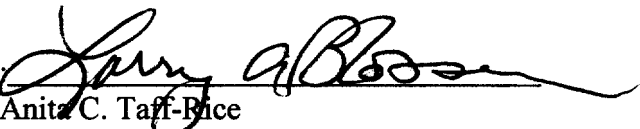
For the foregoing reasons, the Commission should reject SBC's application for authority under Section 271 until such time as SBC demonstrates that it has met its public interest and checklist obligations to all competitive carriers, including data CLECs using DSL technologies to provide advanced services.

Respectfully Submitted

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Dated: February 22, 2000

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²³¹ *Merger Order*, Appendix C at 1.